No. 18,762

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

CITY OF TACOMA, WASHINGTON, APPELLEE

Appeal from the United States District Court for the Western District of Washington

BRIEF FOR THE UNITED STATES, APPELLANT

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BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The district court had jurisdiction over the condemnation proceedings instituted by the United States under 28 U.S.C. sec. 1358. The judgment fixing just compensation to be paid to City of Tacoma was filed on January 14, 1963 (R. 79). The United States filed its notice of appeal on March 13, 1963 (R. 90). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether, when the United States takes an unqualified easement to construct and operate a roadway in connection with a flood control project and for such other uses as may be authorized by the Government, it may allow such roadway to be used for public highway purposes or general travel.

2. When the condemnee raises an issue whether an unqualified roadway easement may be used for public highway purposes or general travel, may the trial court enter a final judgment which expressly leaves the issue undecided over the objection of the condemnor?

STATEMENT

This is one of a series of condemnation cases filed in connection with the Howard A. Hanson Dam and Eagle Gorge Reservoir, King County, Washington, being constructed by the Corps of Engineers, United States Army.[1] The United States filed its complaint and declaration of taking in April, 1961, and an amended complaint and declaration of taking in October, 1961 (R. 2-28, 44-70). The property taken in the instant case is for a road easement. The declaration of taking describes the interest taken as follows (R. 16):

> 3. The estate taken for said public uses is perpetual and assignable easements and rights

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[1] Another aspect of this project was before this Court in *United States* v. *St. Regis Paper Co.*, 313 F.2d 45 (1962).

> of way to locate, construct, operate, maintain, and repair a roadway, in, upon, over and across Tracts Nos. F-613E-1, F-613E-2, F-613E-3, F-613E-4 * * * J-1001E-1 and J-1001E-2, together with the right to trim, cut, fell and remove therefrom all trees * * * or obstacles within the limits of the rights of way; subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their successors and assigns, all right, title, interest, and privileges as may be used and enjoyed without interfering with or abridging the rights hereby acquired by the United States.

Substantially identical descriptions of the estate taken are contained in the complaint and amended complaint (R. 2-3, 44-45). The declaration of taking stated that the land was taken "for use in connection with the Howard A. Hanson Dam and the Eagle Gorge Reservoir * * * and for such other uses as may be authorized by Congress or by Executive Order" (R. 15).

The fee owner of the tracts involved in this appeal is the City of Tacoma, Washington, which held the property as part of its municipal watershed. The City of Tacoma and the United States were agreed that just compensation for the City's property should be $5,531.17. The City, however, wanted the judgment to contain words to the effect that it should not be construed as granting to the United States or the public any right to use the roadway easement for public highway purposes or general travel. The Government would not agree to this, and to resolve

the matter a pretrial hearing was held on December 10, 1962 (R. 101). On January 14, 1963, the parties filed a stipulation as to just compensation which provided in pertinent part (R. 77-78):

> It is stipulated and agreed by and between the parties hereto that the full, just compensation payable by plaintiff, United States of America, for the taking of a perpetual and assignable easement over said tracts together with other interests therein as more fully described in the declaration of taking herein, shall be the sum of Five Thousand Five Hundred and Thirty-One and 17/100 ($5,531.17) Dollars, inclusive of interest, and
>
> * * * *
>
> It is further stipulated and agreed that the said sum shall be full and just compensation and in full satisfaction of any and all claims of whatsoever nature against the United States of America by reason of the taking of the City of Tacoma's interests in land as described in the declaration of taking on file herein.
>
> The said parties agree that a Judgment in proper form based on the compensation herein stipulated may be hereinafter entered upon approval by both parties.

On the same date, a final judgment presented by the City of Tacoma was entered on this stipulation which was "Approved as to form" only by the United States (R. 81). The judgment, in addition to ordering just compensation based on the stipulation, contains these recitations and ruling (R. 79-80):

> THIS CAUSE coming on to be heard on the motion of the City of Tacoma, defendant herein,

and the action being one commenced under the plaintiff's right of condemnation to acquire easements necessary for the construction of a flood control project and uses incident thereto, and defendant, City of Tacoma, a municipal corporation, having appeared, and a stipulation having been entered into agreeing as to the fair and just compensation to be paid for the taking of said easements, and the City of Tacoma and the United States Government having raised and presented arguments to the Court concerning the rights taken and the Court noting these prior proceedings and being fully advised in the premises; * * *

* * * this court does hereby:

ORDER, ADJUDGE and DECREE that the just compensation which the United States of America shall pay to the City of Tacoma in accordance with the stipulation heretofore filed is the sum of $5,531.17 for the taking of the interests in the real estate as described herein and in the declaration of taking and amended declaration of taking filed herein, and it is

* * * *

FURTHER ORDERED, ADJUDGED and DECREED that nothing set forth in this Judgment shall be construed as deciding the contention raised by the City of Tacoma that the United States of America will not by these proceedings acquire a public road right of way or the rights to use these easements for public highway purposes or general travel, and the entry of this judgment shall not be construed as waiving the rights of the City of Tacoma, if any, to contend that the estate taken was for a private roadway only.

The United States filed a memorandum objecting to the final paragraph of the judgment, quoted above, on the grounds (1) "that it is the purpose of condemnation to settle all questions raised as to the estate taken at one time, whereas the inclusion of this language in the judgment invites further legal action on the point" and (2) "that it may be construed as enlarging or diminishing the estate taken by the government in this case, which the Court is powerless to do" (App. brief, pp. 24-25, R. 101). Pursuant to the Government's motion for rehearing and reconsideration of the judgment, a hearing was held on February 11, 1963 (R. 100). At that time the district court entered an order denying the motion. (*Ibid.*) The United States filed its notice of appeal on March 13, 1963.

SPECIFICATION OF ERRORS

The errors of the district court are:

(1) The failure of the court to rule as a matter of law that the declaration of taking was unqualifiedly for "easements and rights of way to locate, construct, operate, maintain, and repair a roadway" and that such unqualified taking of a roadway easement would be broad enough to allow the United States to use the roadway for public highway purposes or general travel.

(2) In the alternative, the failure of the court to rule the extent, if any, to which the use of the roadway by the United States, its permittees, licensees or the general public was qualified.

(3) The inclusion of the following language in the final judgment:

> FURTHER ORDERED, ADJUDGED and DECREED that nothing set forth in this Judgment shall be construed as deciding the contention raised by the City of Tacoma that the United States of America will not by these proceedings acquire a public road right of way or the rights to use these easements for public highway purposes or general travel, and the entry of this judgment shall not be construed as waiving the rights of the City of Tacoma, if any, to contend that the estate taken was for a private roadway only.

SUMMARY OF ARGUMENT

I

The Government intended to take an unrestricted roadway easement usable for any normal roadway purpose including travel by the general public. There can be no doubt that the Government wants an unrestricted and unqualified easement for its road. Once the government official decides the estate necessary to carry out an authorized public project, the function of the district court is to effectuate the transfer and determine just compensation. It is not the judicial function or duty to review the administrative determination. The many decided cases from this Court and others show that the United States cannot be compelled to take either a greater or a lesser estate than that described in the declaration of taking.

In the present case, the court below has in practical effect limited the estate which the United

States seeks to take without expressly deciding anything. If the district court had ruled specifically that the estate set out in the declaration of taking was for a private roadway, it would have been simply a matter of appealing from the lower court's interpretation. In the present circumstance, the Government will continue to argue that it has in fact already taken what it wanted, i.e., an unrestricted road easement, but the threatened litigation by the City of Tacoma will be constantly present. The United States can never be sure when the litigation will come. It is quite certain, however, that the use which the Government plans to make of the road is contrary to the City of Tacoma's contention that only a private roadway easement has been taken.

II

In any event, the court could not leave the issue of the nature of the roadway easement expressly undecided over the objection of the Government. While it is not the province of the district court to change the estate described in the declaration of taking, it clearly has jurisdiction in case of dispute to interpret precisely the estate described according to rules of legal construction. The general rule that a federal court cannot avoid questions within its jurisdiction was laid down by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 403 (1821). The decisions of this Court and many other recent cases support the general rule that when a party has the undoubted right to invoke the jurisdiction of the district

court, it cannot abdicate its authority or duty in favor of another suit.

Some courts have critized the *Cohens* rule as being too broadly stated. The exceptions engrafted to the rule merely emphasize, however, how limited are the situations in which a federal court is justified in refusing to exercise properly invoked jurisdiction. For example, the application of the doctrine of *forum non conveniens* is premised on there being at least two federal courts with concurrent jurisdiction, and the one most convenient to all parties should be chosen. In the present case, there is not a single fact which makes it more advantageous to delay the decision of the nature of the easement which the Government has taken. Only confusion and clouding of the issues can result from delay.

ARGUMENT

I

The Government Intended To Take An Unrestricted Roadway Easement Usable for Any Normal Roadway Purpose Including Travel By the General Public

There can be no doubt that the Government in this case wants an unrestricted and unqualified easement and right of way for its road. The complaint and declaration of taking clearly describe such an easement. It is the intent of the Government to allow members of the general public to use this road under appropriate permits and regulations. The road is substantially a replacement for those parts of Forest Service Road 212 which will be flooded by the Eagle

Gorge Reservoir. Accordingly, the road will be used by loggers, truckers, campers and other persons using adjacent Forest Service lands. The road will also probably be used as a means of ingress and egress to the private timber holdings in the area, parts of which have been taken for construction of the dam and reservoir.[2] Cf. *United States* v. *St. Regis Paper Co.*, 313 F.2d 45 (C.A. 9, 1962); *United States* v. *Pope & Talbot, Inc.*, 293 F.2d 822 (C.A. 9, 1961).

Once the proper government officer has decided the title or estate in land necessary to carry out the authorized public project and that decision has been appropriately expressed in a declaration of taking, it is the function of the district court to effectuate the transfer of that property interest by determination and payment of just compensation. It is not, however, the duty or function of the district court to review the administrative determination, nor to decide that some property interest different from that described in the declaration of taking, whether greater or smaller, is what the Government needs for the project.

These legal principles are amply covered by many decisions from this and other circuits. Upon the fil-

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[2] It is understood that there is currently pending in the state courts in Washington a quiet title action between King County, Washington, and the City of Tacoma to secure for the inhabitants of the town of Lester, Washington, the right to use Forest Service Road 212 without interference. The United States is not a party to this action and is therefore not informed on the precise issues or the progress of the litigation.

ing of the declaration of taking, title to the property interest described therein vests in the United States and cannot thereafter, without the consent of the parties, be changed by court order.[3] *United States* v. *Carey*, 143 F.2d 445, 450 (C.A. 9, 1944); *United States* v. *Hayes*, 172 F.2d 677, 679 (C.A. 9, 1949), and cases there cited; *United States* v. *2,974.49 Acres of Land (Clarendon County, S. Car.)*, 308 F.2d 641, 643 (C.A. 4, 1962). Orders which the court enters touching on vesting of title "are really pro forma, or at most incidental, the real function of the court being to ascertain the just compensation to be paid and to distribute it. The court does not award the right of possession nor adjudge the title. The United States, acting through the Congress and the agencies which Congress appoints, takes what is needed, recognizing the courts as the constitutional organ to fix the constitutional just compensation and ascertain its owners." *Dade County, Fla.* v. *United States*, 142 F.2d 230, 231 (C.A. 5, 1944). Cf. *Catlin* v. *United States*, 324 U.S. 229, 239 (1945).

The unfettered discretion of the administrative officials in deciding what property should be included in a condemnation proceeding is indicated by this Court's decision in *Goodyear Farms* v. *United States*, 241 F.2d 484 (1956). In that case owners of land contiguous to an airfield were trying to intervene in a condemnation suit to acquire land for the ex-

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[3] We assume, of course, a constitutionally valid taking for a purpose authorized by Congress. There is no issue about authority to take in this case.

pansion of the airfield. These landowners claimed the flying of 400 planes a day over their property amounted to the appropriation of an avigation easement. This Court refused to allow them to intervene, saying "We are clear that, if any such right exists as to lands outside the area condemned, it cannot be adjudicated in the present proceeding." 241 F.2d at p. 485. In *United States* v. *Brondum*, 272 F.2d 642 (C.A. 5, 1959), the court refused to allow the declaration of taking describing a *clearance* easement to be interpreted as if there had been a taking of an *avigation* easement. The Fifth Circuit said in the *Brondum* case "The United States Government has complete discretion in determining whether to take a clearance easement or to take an avigation easement, and upon the filing of the declaration of taking and the depositing of the estimated compensation for the taking, here $2,000, the title described in the declaration passed to the Government. The district court lacked jurisdiction to compel the United States to take an avigation easement." 272 F.2d at p. 646.

Just as the United States cannot be required by the courts to take a greater estate than that described in the declaration of taking, as the above cases show, neither can it be compelled to take a lesser one. In *Berman* v. *Parker*, 348 U.S. 26 (1954), the lower court had indicated grave doubts as to the authority of the public agency in a slum clearance and urban renewal project to take full title to the land as distinguished from title to the objectionable buildings. "We do not share those doubts," said the Supreme

Court. "If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation." 348 U.S. at p. 36.

This Court has rejected an attack on the decision of the authorized government officer to take the land in fee, after having initially decided to take only an easement. It held that the estate to be taken is a matter for the officer's discretion. *Simmonds* v. *United States*, 199 F.2d 305, 306 (1952). Similarly in *United States* v. *Mischke*, 285 F.2d 628 (C.A. 8, 1961), the lower court wanted to reduce the acreage which the administrative officials had selected. The Court of Appeals would not uphold this approach, stating, "It is our opinion that the trial court lacked authority to review or to redetermine the question of the necessity for the taking of the 42.5 acres of the Mischke tract." 285 F.2d at p. 631.

For other examples where the courts have refused to vary the estate sought by the Government, see *United States* v. *64.88 Acres of Land (Allegheny County, Pa.)*, 244 F.2d 534 (C.A. 3, 1957); *United States* v. *Holmes*, 238 F.2d 229 (C.A. 4, 1956), earlier decision in same case, *United States* v. *2,648.31 Acres of Land (Counties of Charlotte and Halifax, Virginia)*, 218 F.2d 518 (C.A. 4, 1955); *United*

States v. *State of South Dakota*, 212 F.2d 14 (C.A. 8, 1954); *Oyster Shell Products Corp.* v. *United States*, 197 F.2d 1022 (C.A. 5, 1952), cert. den., 344 U.S. 885; *United States* v. *State of New York*, 160 F.2d 479 (C.A. 2, 1947), cert. den., 331 U.S. 832.

In the present case, the court below has in practical effect limited the estate which the United States seeks to take without expressly deciding anything. This is more unsatisfactory for the Government than if the district court had ruled specifically that the estate set out in the declaration of taking describes only a private [4] roadway interest. If there had been a holding clearly adverse to the Government's contention, it would have been simply a matter of appealing from the court's interpretation of the declaration of taking, and, if necessary, filing a supplemental one. In the present circumstance the Government will continue to argue that it has in fact already taken what it wanted, i.e., an unrestricted road easement, but the

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[4] The judgment of the district court speaks of "public road right of way", "public highway", "general travel" and "private roadway". These terms are not entirely free of ambiguity. For purposes of this brief we shall assume that "public road right of way", "public highway", and "general travel" refer to a use at least as great as a "forest development road" as that term is defined in the Federal Highway Act, 72 Stat. 885, 886, 23 U.S.C. sec. 101. It is assumed, however, that "public highway" was not meant to refer to a part of the system of public roads operated by the State. On the other hand, we shall assume that "private roadway" means a road to which no one has access except government employees in performance of their official duties or private parties who have been given limited access for special purposes such as removal of government timber. That, apparently, is the City of Tacoma's definition.

continued cloud of threatened litigation hangs constantly on the horizon. The City of Tacoma's legal argument has already been endorsed at the very least as a valid and justiciable issue by the final judgment of the district court. The United States can never be sure what use it can make of the road without precipitating the threatened litigation. It can never be sure under what changing economic circumstances the City of Tacoma may decide it is most advantageous to commence suit. It is quite certain, however, that the use which the United States plans to make of this road will be more than that of a mere "private roadway." In this state of affairs, the Attorney General cannot render to the acquiring agency a written opinion as to the validity of the Government's title, to the effect that the interest that the agency asked the United States to condemn has been so acquired, without noting the very serious impediments on that title.[5]

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[5] Where, as here, a declaration of taking was filed, money which has been appropriated for erecting public works on the land taken may be expended "notwithstanding the provisions of section 355 of the Revised Statutes" only after the Attorney General has rendered his opinion that "the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein." Act of February 26, 1931, sec. 5, 46 Stat. 1422, 40 U.S.C. sec. 258e. Under this provision of law, the Attorney General renders a provisional title opinion, which is later finalized to comply with the provisions of R.S. sec. 355, as amended, 40 U.S.C. sec. 255, that "No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any * * * public building of any kind

It is concluded that the final judgment of the district court varies the estate which the Government has sought to condemn in this case just as effectively as if the holding had been that the United States acquired only a "private roadway" instead of the unrestricted right of way to locate, operate and maintain a roadway. As such, it violates the rule announced in the cases cited above, pp. 11-14, that the courts lack jurisdiction to require the United States to take an estate in land different from that described in the complaint and declaration of taking.

II

In Any Event, the Court Could Not Leave the Issue of the Nature of the Roadway Easement Expressly Undecided Over the Objection of the Condemnor

Aside from the error of the district court in failing to hold that the City of Tacoma's contention that the United States took only a "private roadway" easement was without merit, it is ground enough for reversal of the judgment below that it sets out a presumably justiciable issue without deciding anything at all. While it is not the province of the district court to change the estate described in the declaration of taking, it clearly has jurisdiction to decide whether the declaration of taking is ambiguous and, if so, to interpret precisely the estate described according to acceptable rules of legal construction. The cases cited

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whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title." The ruling below thus throws doubt upon the ability of the Attorney General to perform his statutory duty.

in Point I of this brief contain examples where the courts have resolved controversies between the parties as to the meaning of the complaint or declaration of taking. See, e.g., *United States* v. *2,648.31 Acres of Land (Counties of Charlotte and Halifax, Virginia)*, 218 F.2d 518 (C.A. 4, 1955); *United States* v. *64.88 Acres of Land (Allegheny County, Pa.)*, 244 F.2d 534 (C.A. 3, 1957); *United States* v. *Brondum*, 272 F.2d 642 (C.A. 5, 1959). Indeed, we should suppose that the appellee is far more willing than the United States to concede that the extent of the estate described is, in case of doubt, a justiciable issue.

However, having an issue before it in a case in which it has original jurisdiction, viz., a proceeding to condemn real estate for the use of the United States, the district court has no discretion on whether to decide such issue now or in some subsequent action. The general rule that a court cannot avoid questions within its jurisdiction was laid down in the early days of federal jurisprudence by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 403 (1821):

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp

> that which is not given. * * * Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

This Court followed the *Cohens* decision in *Southern California Telephone Co.* v. *Hopkins*, 13 F.2d 814, 820 (1926), aff'd., 275 U.S. 393 (1928), where it was stated that "As a sequel to what we have said, we hold that the District Court was correct in the opinion that it had jurisdiction and in the intimation that the merits were with the plaintiffs, but we think it erred in declining to exercise the jurisdiction. Decision that there was power to hear and determine removed any question of discretion, and left a bounden duty to proceed to a decree." [6] Among the many cases which have followed the *Cohens* rule are the following: *Allegheny County* v. *Mashuda Co.*, 360 U.S. 185, 188-189 (1959); *Meredith* v. *Winter Haven*, 320 U.S. 228, 234 (1943); *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922); *McClellan* v. *Carland*, 217 U.S. 268, 281 (1910); *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909); *Kirby Lumber Co.* v. *State of Louisiana*, 293 F.2d 82, 86 (C.A. 5, 1961); *Beach* v. *Rome Trust Co.*, 269 F.2d 367, 374 (C.A. 2, 1959); *Ermentrout* v. *Commonwealth Oil Co.*, 220 F.2d 527, 530 (C.A. 5, 1955); *United States* v. *Hosteen Tse-Kesi*, 191 F.2d

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[6] Since this brief has been written, this Court has handed down another decision on the duty of the district court to decide issues properly before it. (*United States* v. *Benjamin T. Langendorf, et al.*, F.2d , decided August 22, 1963.)

518, 520 (C.A. 10, 1951); *Chicago Great Western Ry. Co.* v. *Beecher*, 150 F.2d 394, 398 (C.A. 7, 1945); *Mutual Life Insurance Co. of N.Y.* v. *Krejci*, 123 F.2d 594, 596 (C.A. 7, 1941). These cases all support the general rule that when a party has the undoubted right to invoke the jurisdiction of the district court, it must take the case and proceed to judgment. The Court cannot abdicate its authority or duty in favor of another suit.

Some courts have criticized the *Cohens* rule as being too broadly stated. Thus, the Supreme Court stated in *Massachusetts* v. *Missouri*, 308 U.S. 1, 19 (1939):

> We have observed that the broad statement that a court having jurisdiction must exercise it (see *Cohens* v. *Virginia*, 6 Wheat. 264, * * *) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred on them where there is no want of another suitable forum.

The exceptions to which the Court refers merely emphasize how limited are the situations in which a federal court is justified in refusing to exercise a properly invoked jurisdiction. Exceptions are made, for example, in application of the doctrine of *forum non conveniens*. The basic premise of the doctrine is that there are at least two federal courts with concurrent jurisdiction, and the one most convenient to all parties should be chosen. Even in these cases, however, the doctrine that the court whose jurisdiction is properly invoked must decide is given great weight. See

Burt v. *Isthmus Development Co.*, 218 F.2d 353 (C.A. 5, 1955). Another exception is made where a case raises a question of interpretation of controlling state law which should be settled in state courts. *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959). *Louisiana L. & P. Co.* is distiguishable, however, because the district court there did not refuse to decide the issue, but merely stayed proceedings while the parties sought the answer in the Louisiana state courts. See footnote 2, 360 U.S. at p. 27, distinguishing *Meredith* v. *Winter Haven*, 320 U.S. 228. Other exceptions are catalogued in *Meredith* v. *Winter Haven*, 320 U.S. 228, at pages 235-236, and *Allegheny County* v. *Mashuda Co.*, 360 U.S. 185, at page 189. Both these cases take great care to point out the narrowness of the exceptions in comparison with the breadth of the general rule. In the *Meredith* case the Court held, 320 U.S. at p. 234: "In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment." If they are forced to solve difficult and novel questions of state law, *a fortiori*, they are compelled to solve the question of what a pleading in the same case means. Similarly in the *Allegheny County* case the Supreme Court held, 360 U.S. at pp. 188-189: "The doctrine of abstention, under which a District Court may decline to exercise or postpone

the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." In the present case there is not a single fact which makes it more advantageous not to decide the issue of the nature of the easement which the Government has taken. To the contrary, every reason exists for the prompt decision of the question in the suit where it initially arises. Only confusion of the facts and clouding of the issue can result from delay. It is submitted that the present case comes within the broader category of cases where the district court cannot refuse to decide now.

Before closing this point, the Government must frankly state, having no wish to mislead the Court, that if the case is disposed of solely on the second point of this brief, i.e., simply a ruling that the district court must decide the question one way or the other, a second appeal to this Court may be necessary. If on remand the district court holds that the declaration of taking and complaint describe only a "private roadway", the Government will in all probability bring the case here again urging that the description is for an unrestricted roadway. As we view the case under the authorities cited in Point I of this brief, the meaning of the estate taken is purely a matter of law to be decided by the Court. This would also follow from Rule 71A(h), F.R.Civ.P., that in a

condemnation trial all issues except just compensation shall be decided by the Court. We assume from the record that if the district court should hold for the Government, the City of Tacoma would appeal to this Court. It is therefore respectfully urged that the conservation of judicial energies would be better served by a resolution of the meaning of the estate described in the complaint and declaration of taking at this time. Compare *United States* v. *Sixteen Parcels of Land*, 281 F.2d 271 (C.A. 8, 1860), where, in a quiet title suit to determine the title acquired by the United States in condemnation proceedings almost 90 years earlier under state proceedings, the district court's decree contained the caveat:

> We do not mean to indicate, however, that Kansas City may use the land in question for any purpose it may desire. Section 29 of the Charter of 1908 provides that "The lands which may be selected and obtained under the provisions of this article *shall remain forever for parks, parkways and boulevards for the use of all the inhabitants of said city.*" We restrict our ruling upon that issue to the proposition that plaintiffs could not be vested with any title or right of possession by reason of the alleged diversion in the use of the land from park purposes.

The court of appeals considered the merits of this issue and ordered the caveat stricken.

CONCLUSION

For the above reasons it is respectfully submitted that the final judgment of the district court, entered January 14, 1963, is in error in reserving in the last paragraph thereof the contention of the City of Tacoma that the United States took only a "private roadway", and that said judgment should be modified by striking said final paragraph from the judgment.

Respectfully,

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SEPTEMBER 1963

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A. DONALD MILEUR,
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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 5256

UNITED STATES OF AMERICA, PLAINTIFF

v.

29.98 ACRES OF LAND, MORE OR LESS, SITUATE IN KING COUNTY, STATE OF WASHINGTON, and CITY OF TACOMA, a Municipal Corporation, et al., DEFENDANTS

MEMORANDUM OF UNITED STATES IN OPPOSITION TO ENTRY OF JUDGMENT

Filed January 14, 1963

The City of Tacoma, pursuant to direction of the Court, has prepared a judgment which will conclude the case as it regards the City of Tacoma and the United States. The United States objects to the following paragraph:

> FURTHER ORDERED, ADJUDGED AND DECREED that nothing set forth in this Judgment shall be construed as deciding the contention raised by the City of Tacoma that the United States of America will not by these proceedings acquire a public road right of way or the rights to use these easements for public highway purposes or general travel, and the entry of this judgment shall not be construed as waiving the rights of the City of Tacoma, if any, to contend that the estate taken was for a private roadway only.

The United States objects to the inclusion of this paragraph in the judgment on the grounds that it is the purpose of condemnation to settle all questions raised as to the estate taken at one time, whereas the inclusion of this language in the judgment invites further legal action on the point. The United States also objects to the language on the grounds that it may be construed as enlarging or diminishing the estate taken by the government in this case, which the Court is powerless to do. *Western* v. *McGehee*, 202 F.Supp. 287, 290 (D. Md. 1962); *United States* v. *4.43 Acres of Land*, etc., 137 F.Supp. 567, 572 (N.D. Tex. 1956).

/s/ BROCKMAN ADAMS
United States Attorney

/s/ THOMAS H. S. BRUCKER
Assistant United States Attorney

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